ITALIAN-THAI DEVELOPMENT CORP. LTD. & ANOR. *a*

v.

UNITED MANUFACTURERS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 2505 OF 1983] *b*
9 MARCH 1984

CIVIL PROCEDURE: *Application to set aside injunction - Failure to disclose - Effect - Contract - Defendant's debt arising out of pre-receivership transaction - Whether could be set off against plaintiff's debt arising out of separate post-receivership transaction.*

c

In 1979 the defendant company created certain specific charges and a floating charge on all its undertakings, properties and assets in favour of the United Malayan Banking Corp. Bhd. On the floating charge crystallising, receivers and managers were appointed in 1982. Soon after this appointment the receivers and managers came to an agreement with the plaintiffs regarding the sale of certain spare parts to the plaintiffs, the terms of which agreement were set out in a letter dated 11 March 1982. The plaintiffs were granted a credit limit of RM300,000 "on 60 days term", the credit facility to be secured by a bank guarantee to be provided by the plaintiffs, the bank guarantee becoming enforceable on the plaintiffs failing to comply with the terms. *d*

As at 19 September 1983, RM136,759.50 was payable by the plaintiffs to the defendants, a demand was made and the plaintiffs threatened with an enforcement of the bank guarantee. The plaintiffs obtained an interlocutory injunction restraining the defendants from enforcing the guarantee. The plaintiffs claimed that they were entitled to set off the amount against what the defendant company owed them prior to the crystallisation of the floating charge. The defendants applied to have the injunction set aside. *e*

Held:

[1] The plaintiffs had not made candid disclosure of the position obtaining, in particular regarding the letter of 11 March 1982. In the case of an injunction by an *ex parte* application, all the facts must be laid before the Court, otherwise the order may be set aside without regard to the merits. *f*

[2] The plaintiffs were estopped from restraining the defendants from enforcing the bank guarantee if, in fact, there had been a failure to comply with the credit terms.

g

(a) The circumstances that caused the letter of 11 March to be written suggested that the parties had agreed to treat the post-receivership transactions separate from the pre-receivership transactions.

(b) Even in the absence of such an arrangement set off would not have been allowed. What was owing to the plaintiffs arose out of a pre-receivership transaction, whereas what was owing to the defendants arose out of a post-receivership transaction under a different contract. The Courts will not allow a set off between debts arising before the receivership and debts arising afterwards. *h*

[Injunction set aside. Damages, if any to be paid upon assessment, in respect of which the defendants were at liberty to apply.]

i

Cases referred to:
R. v. Kensington Income Tax Commissioners [1917] 1 KB 504
Boyce v. Gill [1891] 64 LT 824
Felt & Textiles of New Zealand Ltd. v. R. Hubrich Ltd. (in receivership) [1965] NZLR 716
Biggerstaff v. Rowatt's Wharf Ltd. [1896] 2 Ch 93
Business Computers Ltd. v. Anglo-African Leasing Ltd. [1971] 1 WLR 578

For the applicants/defendants - T. Thomas; M/s. Skrine & Co.
For the respondents/plaintiffs - S.N. Wong; M/s. Wong Som Nuck & Co.

JUDGMENT

VC George J:

According to the plaintiffs in or about May and June 1979 the plaintiffs purchased from the defendant company certain heavy machinery in respect of which transaction there was to be a "trading-in" to the defendant company of certain machinery belonging to the plaintiffs in respect of which customs duties were payable and if not waived by the Customs Department to be met by the defendant company. In respect of those customs dues apparently the plaintiffs had incurred certain financial charges which they say is payable by the defendant company. All in all in respect of the said transaction the plaintiffs say that the defendant company owe them RM453,741. By the writ in the instant case the plaintiffs claim from the defendants that amount, interest and costs.

Now by a debenture dated 7 December 1979 the defendant company created certain specific charges and a floating charge by which "all the undertaking of (the defendant company) and all its properties and assets movable and immovable whatsoever and wheresoever situate both present and future ..." were charged to the United Malayan Banking Corp. Bhd. The floating charge duly crystallised. The Bank appointed Receivers and Managers on 25 February 1982.

I gather from the affidavit evidence placed before me that soon after the appointment of the receivers and managers, representations were made by the plaintiffs to the receivers and managers for the sale by the defendants to the plaintiffs of certain tractor spare parts. The receivers and managers and the plaintiff company arrived at an understanding on the future sale and purchase of spares and the terms of such understanding were set out in a letter dated 11 March 1982 written by one Abu Hassan Kendut for the defendants (in receivership) to the plaintiffs. This letter is Exhibit AHK1 exhibited to the affidavit by Abu Hassan Kendut affirmed on 28 September 1983 and which is encl. (6) in the Court's file. That there was the arrangement for the supply of spares and as evidenced by the said Exhibit AHK1 has not been denied by or on behalf of the plaintiffs.

By that letter AHK1 in respect of the supply of spares by the defendants to the plaintiffs, the defendants granted a credit limit of RM300,000 to the plaintiffs "on 60 days term" the credit facility to be secured by a bank guarantee for RM300,000 to be provided by the plaintiffs. In one of the paragraphs of the letter was set out that, "it is mutually agreed that (the defendants and the plaintiffs) will honour this arrangement and should (the plaintiffs) fail to comply with the credit terms (the defendants) will not hesitate to enforce the bank guarantee."

A bank guarantee for RM300,000 was provided and later by agreement it would appear that the amount of the bank guarantee was reduced to RM200,000.

As at 19 September 1983 there was an amount of RM136,759.50 due and payable by the plaintiffs to the defendants in respect of spares supplied pursuant to the said agreement. A demand was made for this amount and the plaintiffs were threatened with an enforcement of the bank guarantee.

The plaintiffs do not deny the indebtedness but say that they are entitled to set off the amount against what the defendant company owed them prior to the crystallisation of the floating charge.

By an *ex parte* summons the plaintiffs sought an interlocutory injunction restraining the defendants from enforcing the guarantee. The order sought was granted with a proviso that the life of the guarantee which was due to expire shortly be extended until the trial of the action.

The defendants have now, as they are entitled to do, applied to have the injunction set aside.

Having read the affidavits filed on behalf of the defendants and having heard Counsel for each of the parties I have come to the view that the plaintiffs were not entitled to the injunction that they had obtained and that it ought to be set aside.

In the first place in seeking and obtaining the interlocutory injunction the plaintiffs have not made a candid disclosure of the position obtaining as they should have. In particular the failure to disclose that letter of 11 March 1982 (AHK1) is a serious omission. In seeking an injunction by an *ex parte* application all the facts must be laid before the Court and nothing suppressed (*R v. Kensington Income Tax Commissioners* [1917] 1 KB 504) otherwise the order may be set aside without regard to the merits (*Boyce v. Gill* [1891] 64 LT 824).

The circumstances that caused that letter AHK1 to be written suggests that the parties had agreed to treat the post-receivership transaction separate from the pre-receivership transactions. As has been seen it was "mutually agreed that ... should (the plaintiffs) fail to comply with the credit terms, (the defendants) will not hesitate to enforce the bank guarantee." On that alone the plaintiffs are estopped from restraining the defendants from enforcing the bank guarantee if in fact there had been a failure to comply with the credit terms. There has been no denial that the amount claimed arising out of the transaction pursuant to the credit arrangements evidenced by the said letter AHK1 is due and payable.

Even in the absence of that arrangement ordinarily the Courts will not allow a set off between debts arising before the receivership and debts arising afterwards. If a pre-receivership creditor enters into a contract with the receiver under which the former is indebted to the receiver the debt must be paid without off-setting. The principle was explained by Richmond J in *Felt & Textiles of New Zealand Ltd. v. R. Hubrich Ltd.* (in receivership) [1965] NZLR 716, where a receiver sold an asset of the debtor company to a creditor who sought to set off:

> ... The indebtedness of the respondent to the appellant was incurred at a time when the respondent was truly its own master. The indebtedness of the appellant to the respondent was incurred at a time when the respondent was acting not as a free agent but for the benefit of the bank which then had a fixed charge on the calculating machine and by the terms of the debenture would acquire an equitable assignment of the purchase price immediately the sale took place. The position of the respondent was thus analogous to that of trustee. In substance, the appellant was not dealing simply with the company but with the company and the debenture holder.

Where the claims arise under one contract and the cross-claim which it is sought to set off arises subsequent to the appointment of the receiver and under a different contract the general rule is undoubtedly that set off is not, in general, possible (*Biggerstaff v. Rowatt's Wharf Ltd.* [1896] 2 Ch 93; *Business Computers Ltd. v. Anglo-African Leasing Ltd.* [1971] 1 WLR 578).

In the instant case what is said to be owing to the plaintiffs arises out of a pre-receivership transaction in respect of the sale of certain tractors. On the other hand, the claim of the defendants against the plaintiffs is in respect of a post-receivership transaction under a different contract for the supply of spares payment in respect of which was secured by the bank guarantee.

The injunction granted by the order of the Court of 26 September 1983 is set aside. Damages if any incurred by the defendants as a result of the said injunction will be paid by the plaintiffs to the defendants upon assessment in respect of which there will be liberty to apply. Costs of this application shall be paid by the plaintiffs to the defendants.

Also found at [1984] 1 CLJ 366